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Nos. 90-29, 90-38

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. PLEDGER
PETITIONER
v.
DANIEL L. MEDLOCK, et. al.
RESPONDENTS
and
DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
JAMES C. PLEDGER
PETITIONER

CONSOLIDATED CASES

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR PETITIONERS IN DOCKET NO. 90-38

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Docket No. 90-29

PARAGON PRINTING & STATIONERY COMPANY, INC

QUESTIONS PRESENTED

1. Under the provisions of the First Amendment, is the State of Arkansas unconstitutionally imposing its Sales Taxes upon the purchases and sales of cable television services by the respective cable television subscribers and operators who are members of the petitioner-class, because subscribers and sellers of similarly situated goods or services in the electronic and print segments of the mass communications media are not being charged these same Sales Taxes by the State of Arkansas?

2. For purposes of applying Arkansas' general Sales Tax and determining what entities are "similarly situated," what are the First Amendment standards to be applied to the rights of cable television operators and subscribers, when compared to the standards already established by this Court to protect the First Amendment rights of those engaged in other businesses involved in both the electronic and print segments of the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, as amended by Act 769 of 1989, and include the following named Plaintiffs:

Petitioner Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Petitioner Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Petitioner Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

Respondents are officials of state or local governmental entities wherein Arkansas' state and local Sales Taxes are imposed and these individuals are defendants in their official capacities, as follows:

Respondent James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing funds to state agencies and to county and municipal governmental entities.

Respondents Donald Venhaus and Patricia Tedford are, or were, the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a county-wide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 19

ARGUMENTS:

CABLE TELEVISION SERVICE PROVIDERS SHOULD BE DETERMINED TO HAVE THE SAME FIRST AMENDMENT PROTECTED RIGHTS OF FREE SPEECH AND FREE PRESS AS DO BUSINESSES INVOLVED IN THE SALE OF GOODS AND SERVICES IN THE PRINT SEGMENT OF THE MASS COMMUNICATIONS MEDIA FOR PURPOSES OF DETERMINING WHETHER A STATE TAX IS BEING DISCRIMINATORILY IMPOSED UPON SALES OF GOODS OR SERVICES BY ONE ENTITY AND NOT THE OTHER 22

Page

a. Purpose for the *Minneapolis Star* Test 23

b. First Amendment Comparison and Analysis 26

c. Proper Application of the *Minneapolis Star* Test 29

d. The facts in this case established that cable television services are similarly situated to goods or services provided by other businesses involved in the electronic and print segments of the mass communications media 32

CONCLUSION 36

Page

TABLE OF AUTHORITIES

CASES: Page

Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 421 (1987) ..... passim

Century Communications Corp. v. FCC, 835 F.2d 292 (C.A.D.C., 1987), *cert. denied*, 108 S.Ct. 2014 (1988) 28

Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal., 1968) 28

City of Alameda v. Premier Communications, Inc., 202 Cal. Rptr. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984) 31

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 14, 16, 26

Dept. of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304 (Fla., 1990) 31

Dow Jones & Co. v. Oklahoma Tax Commission, 787 P.2d 843 (Okla., 1990) 22, 31

Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N.D. Cal., 1987) 28

HBO v. FCC, 567 F.2d 29 (C.A.D.C., 1977) *cert. denied*, 434 U.S. 839 (1977) 28

Hearst Corp. v. Iowa Dept. of Revenue and Finance, ____ N.W.2d ____, 1990 W.L. 135941 (Ia., Sept. 19, 1990) 31

Page

Hearst Corporation v. Dept. of Revenues, 779 S.W.2d 557 (Mo., 1989) 31

Louisiana Life, Ltd. v. McNamara, 504 So.2d 900 (La. App. 1st Div., 1987) 31

McGraw-Hill, Inc. v. State Tax Commission, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989), *affirmed and adopted*, 252 N.E.2d 163 (N.Y., 1990) 20, 29, 30

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues, 460 U.S. 575 (1983) ..... passim

Newsweek, Inc. v. Celauro, 789 S.W.2d 247 (1990) 31

Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission, 789 P.2d 1312 (Okla., 1990) 20, 29, 30

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (C.A. 1985), *affirmed and remanded, City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) 28

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986) 16, 26, 28

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 29

Satellink of Chicago, Inc. v. City of Chicago, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988) 31

Southern Living, Inc. v. Celauro, 789 S.W.2d 251 (TN., 1990) 31

Page

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 22

United States v. O'Brien, 391 U.S. 367 (1968) 24

Constitutional Provisions:

First Amendment, U.S. Constitution .....passim

Fourteenth Amendment, U.S. Constitution 5

Statutory Provisions:

Federal:

47 U.S.C. § 542 5

State:

Ark. Code Ann. § 26-52-301(3)(D) 2, 34

Ark. Code Ann. § 26-53-106 2

Miscellaneous:

Note: *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. Rev. 133 (1976) 28

Note: *Cable Television: A New Challenge for the "Old" First Amendment*, 60 St. John's L. Rev. 114 (1985) 28

Arkansas Revenue Policy Statement 1988-1 24

Arkansas Revenue Policy Statement 1988-3 24

Parsons, *Cable Television and the First Amendment*, Lexington Books (1987) 28

Shapiro, Kurland & Mercurio, *Cable Speech: The Case For First Amendment Protection* (1983) 28

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OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (App. B, p. 3a, Petition in Docket No. 90-38) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the petitions for rehearing is unreported (App. A, p. 1a, Petition in Docket No. 90-38).

The Opinion (App. D, p. 1a, Petition in Docket No. 90-38) and Order and Judgment (App. C, p. 92, Petition in Docket No. 90-38) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, p. 3a, Petitions in Docket No. 90-38) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, p. 1a, Petition in Docket No. 90-38). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

U.S. Constitution:

Amendment 1. Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Statutes:

Ark. Code Ann. § 26-52-301(3)(D), as amended, (Sales Tax on Cable Television Services), and Ark. Code Ann. § 26-52-401 (Exemptions from Sales Tax) are set forth in the Petition in Docket No. 90-38, App. E, pp. 23a-25a.

Ark. Code Ann. § 26-53-106, as amended, (Use Tax imposition Statute) is set out in the Petition in Docket No. 90-38, App. F, pp. 26a-27a.

These statutes are set forth at length in Appendices E and F to the Petition in Docket No. 90-38.

STATEMENT OF THE CASE

Statutory Scheme for Sales Taxes. Since 1941, Arkansas has imposed a permanent Sales Tax and, since 1949, has imposed a corresponding Compensating (Use) Tax. The sale or consumption of *all* tangible personal property in Arkansas is subject to either the Sales or Use Taxes, unless specifically exempted. However, there are only certain enumerated services that are subjected to the Sales Taxes, while no services are subjected to Arkansas' Use Taxes. (JA 177-182) Since 1981, countywide and citywide Sales and Use Taxes have been imposed, on a local option basis, upon the sale or consumption of items to which the state Sales or Use Taxes Use Taxes apply. The Arkansas General Assembly adopted Act 188 of 1987 (App. G, p. 28a, Pet. for Cert. Dkt. No. 90-38), effective July 1, 1987. This Act imposed, for the first time, Arkansas' state and local Sales Taxes upon charges made by cable television operators in return for providing cable television services to subscribers in Arkansas. No amendment was made to Arkansas' Use Tax statutes by Act 188 of 1987 (JA 118-124).

Upon the effective date of Act 188, Arkansas' statutory scheme for imposing Sales and Use Taxes upon the sale of goods or services by businesses involved in the mass communications media in Arkansas imposed the Sales Tax upon cable television service; and books and magazines sold over the counter (but not by subscription); upon the sale or rental of video tapes; and upon the admission charge to movie theatres. The sales of newspapers and the sale of advertising in newspapers and on billboards were specifically exempted from Arkansas' Sales and Use Taxes. Likewise, either by statutory interpretation, administrative ruling, or because of this Court's decision in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 21 (1987), the sale of magazines by subscription (printed within or without the State of Arkansas) were exempted from the imposition of Arkansas' Sales and Use Taxes. (JA 118-123, 183-188) The sale of "scrambled" satellite television broadcast programming to home dish-antenna

owners for a subscription fee and the advertising sold to sponsor local wireless broadcast radio and television services were simply not mentioned by Arkansas' Sales and Use Tax statutes, and, therefore, were "excluded" from the tax base for these two excise taxes (JA 118-120, 183-188).

Constitutional Challenge to Act 188 of 1987. In late May of 1987, before the Sales Taxes imposed by Act 188 upon the sale of cable television services became effective, Daniel L. Medlock, a cable television subscriber; Community Communications Company, a cable television operator with six (6) franchise systems in Arkansas; and the Arkansas Cable Television Association, Inc. (ACTA), a trade organization composed of approximately 80 cable operators with cable systems operating throughout the State of Arkansas, instituted this class action suit in the Pulaski County Chancery Court to contest the constitutionality of the state and local Sales Taxes then to be imposed for the first time upon the charges for cable television service. (JA 1-16, 85, and 108)

The Petitioners' Complaint alleged that cable television services were singled out, among other businesses that were involved in both the print and electronic segments of the mass communications media in Arkansas, by the imposition of these state and local Sales Taxes. The Petitioners alleged that cable television delivered news, information and entertainment to its subscribers and sought to communicate these messages on a wide variety of topics and in a wide variety of formats. The cable system operators alleged that their activities in cablecasting this news, information and entertainment caused them to be engaged in the communication of ideas, expressions, philosophies and news, which activities were protected by the rights of free speech and free press guaranteed by the First Amendment of the U.S. Constitution. The Petitioners further alleged that their electronic communications were the same as the messages communicated in the goods and services sold by wireless television and radio broadcasters, satellite television broadcasters, and newspapers and magazines operating in Arkansas, and therefore, their sale of cable services should be

deemed to have the same First Amendment protected status as the sale of the goods and services by these other businesses engaged in the electronic and print segments of the mass communications media. (Second Amended Complaing, ¶ ¶ 17-19, JA 12)

The Petitioners specifically alleged in their Complaint that the adoption of Act 188 of 1987 and the resulting imposition of Arkansas' Sales Tax upon the sale of cable television services violated (1) their First Amendment rights of free speech and free press; (2) their rights to equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution; and (3) the supremacy clause of the U.S. Constitution, because Congress preempted this area of law by specifically stating in the Cable Communications Policy Act of 1984 (47 U.S.C. § 542) that no state or local excise tax could be discriminatorily applied against cable television service. (Second Amended Complaint, ¶ 16, JA 10-12) The Defendants (representatives of the Arkansas Revenue Division, the State Treasurer and the cities and counties where local Sales Taxes were imposed) filed answers generally denying the allegations in the Petitioners' Complaint, and most of them specifically denied that the activities of communicating messages or ideas by the sale of cable services had any First Amendment protections. (JA 16-27)

Class Action and Escrow Account. Following an evidentiary hearing on Petitioners' Motions for Preliminary Injunction (i.e. request for escrow account) and Certification of the Action as a Class Action, the Chancellor entered an Order on Pending Motions (JA 29-34) wherein he made specific findings that the Petitioners' complaint raised common questions of fact and law and that the escrow account request should be established. Pursuant to these findings, the Chancellor ordered the challenged state and local Sales Taxes to be escrowed and the State Revenue Division was mandatorily enjoined to keep separate records so as to identify the payors and the monthly collections of the Sales Taxes imposed by Act 188. (JA 34-37) A specificc order was entered

certifying this matter as a class action, with the Community Communications Company representing some 100 cable operators in the State of Arkansas and Daniel L. Medlock representing some 400,000 cable television subscribers. (JA 38-40) After issuance of the notice of class certification, the City of Fayetteville, Arkansas, was allowed to intervene as a Defendant. (JA 44-47)

Evidentiary Record. At the evidentiary hearing on the Motions for Preliminary Injunction and Class Certification, and at the trial of this case, extensive testimony and documentary evidence were introduced by the Petitioners regarding the ownership and operation of cable television systems; the programming available and the programming choices made by cable operators; how cable television services compared with similar services or goods provided by both the print (newspaper and magazine) and the wireless broadcast (radio and television) segments of the mass communications media in Arkansas; and the imposition of Arkansas' state and local Sales and Use Taxes upon the goods or services sold by these various types of businesses engaged in the mass communications media in Arkansas. This testimony and documentary evidence can be generally summarized as follows:

(a) *Cable Industry in Arkansas.* As of the time of trial in May of 1988, there were approximately 100 separate cable television systems operating in approximately 300 separate communities in the state, and there were more than 400,000 separate subscribers to these cable television services. The largest cable system had approximately 68,000 subscribers, the smallest had approximately 120 subscribers, and the average cable system had approximately 4,300 subscribers. The smallest number of channels offered by any cable system was 12, with the average system offering 32 separate channels. Suscription fees generally ran between $15 and $20 per month, per subscriber, and approximately 80 of the 100 cable system operators were members of the ACTA. (JA 48-57) The cable television operators in Arkansas were required to pay the state's general Income Taxes, local Property Taxes, and the

state's Sales and Use Taxes that were imposed upon these operator's purchases of taxable goods or services. (JA 91-92)

(b) *Cable System Operations and Programming Availability.* Though some systems in Arkansas were larger and more sophisticated than others, all cable systems could be described as having facilities to receive electronic programs at their satellite dish antenna (earth station) that were beamed to them by the programming supplier through a geo-stationary satellite. The program signal was then placed into the "headend" at the cable operator's receiving station, transmitted along the cable operator's lines within the municipality, the signal was amplified approximately every mile, and the programming signals were delivered to the convertor at the subscriber's home. (JA 53-54, 56-5, 74-75) Jerry Bryars, Past President of ACTA, testified that the technology was now available to stack 100 or more channels on the low frequency coaxial cable for delivery of programming to the subscribers' homes. (JA 115) In more metropolitan areas, the subscriber penetration (i.e. percentage of subscribers compared with number of potential subscribers) ran from 50% to 55%, while in more rural and mountainous areas, where wireless broadcast television reception was poor or unavailable, cable subscriber penetration ran 90% or more. (JA 156, 172) A number of the cable systems in Arkansas are operated by companies that own more than one system, and are generally referred to multiple system operators (MSOs). (JA 51, 97-98, 106-108, 111-112, and 143-145) The delivery of programming services by the cable operator was generally on two levels, with a "basic" level of programming consisting of 20 or more channels for a set price (e.g. $15.00 per month), and then a "premium" level of services (e.g. HBO, Showtime, Cinemax, The Movie Channel, etc.) being charged for separately (e.g. $8.00 per month). (JA 52-53, 75-77) In addition, in the "addressable" cable systems,[1] the cable

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[1]These are more sophisticated systems where the subscriber can call the operator and arrange for a one time viewing of a specific event, such as a prize fight, a concert, etc. The cable operator will code the signal for this specific programming so that the subscriber's converter will be able to pick up that signal at the appointed time the "special program" is being transmitted.

operator would offer a pay-per-view (PPV) service, which allowed the cable subscriber to choose, on an ala carte basis, certain special programming at an additional cost. (JA 55, 75-77)

(c) *Governmental Franchise and Franchise Fee.* Since the cable operators have to make use of the public right-of-ways to either string or bury their coaxial cables to provide the programming service from their "headend" to the subscribers' converters, each cable operator secures a franchise for a specified geographic area, usually from a municipal government. In this franchise agreement, the cable operator generally agrees to meet minimum requirements with regard to insurance, the use and maintenance of the public right-of-ways, etc., and, in many instances, the operators have agreed to provide a number of "access channels" for the use of local government, religious and educational organizations, etc. without further cost to the users of such channels. In return for the use of the public right-of-ways, the cable operators negotiate with each community to pay a monthly "franchise fee" for the use of these public right-of-ways. (JA 59-60, 73, 79, 97-98)

(d) *Cable Television's Original Programming Services.* The cable operators testified that there was original programming that they produced, or which was produced strictly for cable television systems, which programming was not generally available on wireless broadcast television. This "original programming" may have been local, statewide or national in scope, and its form ran from messages conveyed on the simplest community bulletin boards and local weather bars up to 24 hour coverage of national and international news. Some of the "local" programming that was originated by the cable operators in Arkansas were the cablecasting of city council and school board meetings, local church services, high school football games, local newscasts by high school journalism students, coverage of local festivals and parades, and the communication of original plays written for presentation on local cable systems only. (JA 58, 59, 65, 70-72, 78, 93-94, 117-118, 150, 155, 162)

With regard to "statewide" programming, a two minute long video tape (PX 4 [R. 831], JA 61-62) was introduced and played at the trial. This video tape portrayed examples of statewide vocational training, agricultural programming, etc. that were produced solely for, and made available only over, cable systems, at the option of the individual cable operator.

On a "national" level, the cable operators testified about their cablecasting of C-SPAN I and II (gavel to gavel coverage of the Senate and House of Representatives of the U.S. Congress)[2]; the Weather Channel (a 24 hour per day national weather service); Cable News Network (a 24 hour per day network devoted exclusively to news coverage, both nationally and internationally); CNN Headline News (a 24 hour per day network devoted strictly to news, but repeating its summary format every 30 minutes); Financial News Network (an 18 hour per day network devoted strictly to matters of finance and economics); and certain foreign language channels (e.g. SIN) that provided programming directly from foreign countries (e.g. Mexico). (JA 67-68, 131-133) None of this type of "national" programming was generally available to viewers on wireless broadcast television stations (either of an independent or network affiliated type).

(e) *Cable Operators' Exercise of Editorial Discretion.* Since most systems in Arkansas, at the time of trial, were limited to 36 channels or less, and there were more than 100 separate satellite programming services available (PX 2, 3 and 9, JA 191-197 [R. 839]), each cable operator testified that they had to exercise editorial discretion, in the same manner as would a newspaper or magazine editor, in deciding what programming to make available to their subscribers. These cable operators testified that they previewed the available programming before choosing to put it on; that they were not

[2]The C-SPAN network happened to be in Little Rock, Arkansas, at the time of the evidentiary hearing on the Petitioners' Motion for Preliminary Injunction in August of 1987, providing 16 hours per day of live coverage, with the assistance and support of the local cable system operator, of the Southern Legislative Conference which was then being held in Little Rock, Arkansas. (JA 67-68)

required to carry any program and refused to carry some programming; and that they constantly changed programming to try and appeal to their subscribers' interest and to draw new subscribers. The MSO operators also testified that their programming was different on every individual cable system they operated in Arkansas. (JA 57, 63-64, 69, 75-77, 94-95, 117, 145-147, 151-152, 160-161)

(f) *Comparison of Cable Service with (1) Print and (2) Other Broadcast Services.* The Petitioners' witnesses testified that they considered their delivery of cable programming to be part of the mass communications media in Arkansas that was composed of both the electronic (cable, wireless broadcast radio and television, and satellite broadcast television) segments and the print (newspaper and magazine) segments. (JA 81-85, 100-101, 108, 115, 133-137, and 165-170) In fact, in the electronic segment of the mass communications media, the Petitioners' witnesses testified that cable operators provided a much greater variety of programming than did wireless broadcast television (JA 139-140), and that cable services provided virtually the same programming as was provided by "scrambled" satellite television broadcast services sent to a dish-antenna owner's backyard-earth station facility in return for a subscription fee. (JA 141, 147-150) The specific comparisons were as follows:

(i) *Print Segment Comparison.* The Petitioners' witnesses testified that they believed that cable programming provided (for a fee) news, information and entertainment that was the same or similar to that which was provided (for a fee) by the publishers of newspapers and magazines. Like the print media, these witnesses testified that they sometimes received complaints about programming from subscribers, but, like subscribers to newspapers or magazines, if a subscriber did not like part of the programming, the subscriber simply did not watch the objectionable programming, but continued to subscribe to the other programming offered (as opposed to cancelling the cable service). (JA 100-101) A direct comparison was made between the type of news, entertainment and

information communicated by cable programming and the type of news, entertainment and information deliveed by a general interest magazine such as the *Reader's Digest*. Like the *Reader's Digest* content, some of the cable programming was original, some was republished from other sources, and both communicators carried advertising. (PX 10 [R. 840], JA 134, 136, 168-169) Similarly, direct comparisons were made between the communications of protected speech by local newspapers and *USA Today* and CNN and the Headline News Networks; the news communicated by *Time* magazine and by *CNN;* the sports news conveyed by *Sports Illustrated* and by ESPN; and the information that was communicated by *People* magazine and a general interest network like the Lifetime Network, etc. (JA 81-84, 86, 100-101, 133-136, 139, 165, 168-170, 172-174) These witnesses generally characterized cable television's varied programming to be the presentation of an "electronic magazine."

(ii) *Electronic Segment Comparison.* The Petitioners' witnesses also testified that they, as cable operators, carried local broadcast television's signals on their systems (without a fee), and they also carried such wireless broadcast television signals to distant locations within the State of Arkansas where a broadcast signal would not have otherwise reached a viewer. The relationship between the local wireless broadcast television operator and the cable operator was characterized, by one of the Petitioners' witnesses, as being "symbiotic." (JA 79-80, 83-84, 136-137) With regard to "scrambled" satellite television broadcast, the Petitioners' witnesses testified that it was virtually the same programming that they secured from the same satellites and retransmitted over the cable facilities to their subscribers' converters. (JA 84-85, 141, 149-150) These witnesses also testified that between the time of the Preliminary Injunction hearing (August of 1987) and the time of trial (May 1988) in this case, that the number of satellite

networks that "scrambled" their satellite signals increased from 7 (PX 2, JA 191-192) to more than 50 (PX 9 [R. 839]).[3]

(g) *Statutory Scheme of Sales Tax.* The Arkansas tax administrators who were called as witnesses testified that cable television services had not been taxed before July 1, 1987, the effective date of Act 188 of 1987. Likewise, they testified that the subscription fees for "scrambled" satellite television services delivered in Arkansas were *not* subjected to tax after the adoption of Act 188. Further, they testified that the sale of magazines or books over the counter (but not by subscription), admission fees to movies and athletic events, and the rentals or sales of videotapes, as well as the sale of VCRs, radio sets, television sets and satellite dishes and decoders were all

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[3]Petitioners offered some testimony about how Arkansas and consumers would order and pay for these "scrambled" satellite services, for the purpose of establishing the discrimination in the taxing of similarly situated broadcast services. However, the Petitioners had no opportunity (or need at the trial level) to offer extensive evidence with regard to what they believe was the "futile" attempt by the Arkansas General Assembly to impose Arkansas' Sales Taxes upon these subscription fees charged for "satellite" subscription services, by the amendment of Ark. Code Ann. § 26-52-301(3)(D) by the adoption of Act 769 of 1989, since Act 769 was signed into law 11 days *after* the Chancellor rendered his written decision in the trial court. However, as appendices to their Petition for Rehearing before the Arkansas Supreme Court, the Petitioners attached the affidavits of (1) a "scrambled" satellite service subscriber, (2) a "scrambled" satellite service provider, and (3) a "scrambled" satellite service collecting agent within the State of Arkansas, to show that there was an evidentiary basis for the Arkansas Supreme Court *not* to approve prospectively the constitutionality of the Sales Tax statute (as amended by Act 769), as was done by the Arkansas Supreme Court below. Those three affidavits were attached as Appendices I, II and III to the Appellants' Petition for Rehearing, but they were ordered physically stricken by the Order of the Arkansas Supreme Court and are, therefore, not contained in the designated record in this case, though they were "proffered" or "tendered" for filing with the Clerk of the Arkansas Supreme Court. At the suggestion of the Clerk of this Court, the full Appellants' Petition for Rehearing, with Appendices I, II and III, has been "lodged" with the Clerk of this Court, for the convenience of the members of the Court if they deem it necessary to review such factual information for purposes of comparing the "scrambled" satellite television broadcast services to the Petitioners' cable television services provided in Arkansas.

subject to Arkansas' state and local Sales and Use Taxes. However, they testified that the sale of newspapers, or advertising in newspapers and on billboards, or the sale of magazines by subscription (whether printed within or without the State of Arkansas), the advertising sold by wireless broadcast radio and television services, and the sale of "scrambled" satellite subscription television services were *not* subjected to Arkansas' state and local Sales Taxes at the time of the trial in May of 1988. (JA 118-119, 120-123, 123-124, 141, 183-185)

These tax administrators also testified that the only reason for the extension of the imposition of the state's Sales Taxes to cable services by Act 188 of 1987 was for the purpose of raising general revenue and to broaden the Sales Tax base. (JA 124-125, 179-180) It was also established that the Arkansas General Assembly had twice, since the decision was rendered by this Court in the *Arkansas Writer's Project* case, had legislative bills introduced to repeal the exemption for magazines published in Arkansas of a specific content that was questioned in that case, and, in both instances, the Arkansas General Assembly had, by positive vote, defeated a measure that would have repealed this questioned exemption.[4]

Trial Court Opinion. This case was submitted to the Chancellor on this evidentiary record and the extensive post-trial briefs of the parties. In his decision, entered on March 10, 1989, the trial court Chancellor made specific Findings of Fact and Conclusions of Law. (App. D, p. 11a, Pet. for Cert. Dkt. No. 90-38) Therein, he found that cable television was entitled to claim the First Amendment protected rights of free speech and free press. The Chancellor drew many analogies between cable television and the print segments of the mass communications media, including the constant or continuing exercise of editorial discretion by cable operators in making programming decisions. The Chancellor also found that cable system

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[4]H.B. 1031, First Extraordinary Session, of 1987, and H.B. 1803 of 1989. (PX 7, JA 121-122 [R. 577-587, 649-652], and JA 197-200)

operators are cablecasting a retransmission of original works by others while some of the programming is actually originated by the cable television system operators or is programming specifically for cable television distribution. The Chancellor specifically found (App. D, p. 14a):

> 7. The "cable casting" of cable television operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. Programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

The Chancellor also noted that the Petitioners' witnesses testified that they considered the totality of cable television programming to be the equivalent of an "electronic magazine." (App. D, p. 14a)

In his Conclusions of Law, the Chancellor specifically found (App. D, p. 17a):

> 2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and cable television subscribers' right to receive cable programming.

After citing and quoting with approval from this Court's decision in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Chancellor proposed the question to be decided as:

> This Court must determine the extent of First Amendment protected rights of cable television. (App. D, p. 18a)

Thereafter, relying upon certain decisions by three United States Courts of Appeal, the Chancellor upheld the

constitutionality of Act 188's imposition of these Sales Taxes upon cable television services, principally because cable television was found to make a much greater utilization of the public right-of-ways than do businesses engaged in either (1) the ot electronic segments or (2) the print segments of the mass communications media. The Chancellor held that the raising of general revenues *was* a sufficiently compelling governmental interest to satisfy this Court's constitutional test for the incidental effect a tax may have upon First Amendment rights, and, therefore, he decided that the Petitioners' constitutional challenge to the Sales Taxes imposed by Act 188 of 1987 had failed.

On March 13, 1989, the Chancellor entered Judgment, dismissing the Petitioners' complaint, and releasing approximately $6.2 million of previously escrowed state and local Sales Taxes. (App. C, p. 9a, Pet. for Cert. Dkt. No. 90-38)

Amendment to Sales Tax Statute in 1989. On March 21, 1989, after the trial court's decision was rendered in this case, the Arkansas General Assembly adopted Act 769 of 1989 (App. H, p. 30a, Pet. for Cert. Dkt. No. 90-38) to amend the provisions of Act 188 of 1987 (which had by then been codified as Ark. Code Ann. § 26-52-301(3)(D) (App. E, p. 23a, Pet. for Cert. Dkt. No. 90-38). Act 769 of 1989 attempted to also extend the state and local Sales Taxes to certain charges made by out-of-state providers of "scrambled" satellite broadcast television subscription services that were supplied to Arkansas subscribers. However, Act 769 did not amend Arkansas' Compensating (Use) Tax statutes. Therefore, subscription fee charges for out-of-state providers of "scrambled" satellite television broadcast services to subscribers located in Arkansas, after July 1, 1987, are still not subject to Arkansas' Sales Taxes or Compensating (Use) Taxes when the fee is paid by the Arkansas subscriber directly to the out-of-state provider. Because of this 1989 amendment to the Arkansas Sales Tax law, the subscription fees for "scrambled" satellite services are subjected to Arkansas' Sales Taxes only when they are paid to an in-state "collecting agent" (e.g. a local cable

television operator or rural electric company) for the out-of-state "scrambled" satellite service provider.

Arkansas Supreme Court Opinion. On appeal to the Arkansas Supreme Court, the Petitioners requested that court to find that the statutory scheme of Sales Tax imposition on businesses engaged in the mass communications media, even after its amendment by Act 769 of 1989, unconstitutionally discriminated against the sale of cable television services, because these Sales Taxes were not imposed upon the sale of goods or services by other businesses engaged in both the electronic and print segments of the mass communications media in Arkansas. The Arkansas Supreme Court, in a decision entered on February 28, 1990 (App. B. p. 3a, Pet. for Cert. Dkt. No. 90-38), overturned the Pulaski County Chancery Court's decision and held that the imposition of the state and local Sales Taxes upon the proceeds from the sale of cable television services by Act 188 of 1987 was unconstitutional, because the discriminatory imposition of these excise taxes violated the First Amendment's rights of free speech and free press that belonged to the Petitioners. The state Supreme Court specifically rejected the public right-of-ways analogy exception, which had been proffered by the State of Arkansas and adopted by the trial court Chancellor, mainly because the Petitioners paid a municipal franchise (i.e. rental) fee for the use for these public right-of-ways, and, thus, the use of these right-of-ways by the cable operators bore no relation to the Sales Taxes in question.

However, the Arkansas Supreme Court did not delineate in its opinion what it considered were the First Amendment protected rights that did apply to cable television services. Instead, the Arkansas Supreme Court simply noted this Court's prior decision in *Preferred Communications, supra,* and approved, by reference, the discussion of such First Amendment rights by the District of Columbia Court of Appeals in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied,* 476 U.S. 1169 (1986) (App. B, p. 6a). The Arkansas Supreme Court very briefly mentioned and

discussed four decisions by this Court dealing with the First Amendment protected provisions of free speech and free press, especially as they related to state taxation. The Court then held that the state and local Sales Taxes in Arkansas imposed upon charges for cable television services by Act 188 of 1987 were unconstitutional for the period from July 1, 1987, through June 30, 1989, because these excise taxes were discriminatorily applied between mass communicators delivering substantially the same services (i.e. cable television and "scrambled" satellite services).

However, the Arkansas Supreme Court specifically refused to compare cable television's First Amendment rights to those of businesses involved in the print segment of the mass communications media, because the Court stated that it had not been cited to any case where this Court had rendered a decision on such grounds. The Arkansas Supreme Court therefore refused to hold that the challenged Sales Taxes were unconstitutional for periods after the amendment to the Arkansas Sales Tax Act, effective July 1, 1989, by Act 769 of 1989, and, in effect, rendered an advisory opinion that the 1989 amendment had cured the constitutional infirmity that it had found in Arkansas' statutory scheme for imposing Sales Taxs.

Timely Petitions for Rehearing were filed on behalf of the State of Arkansas (arguing that the Arkansas General Assembly did not know about "scrambled" satellite services when Act 188 of 1987 was adopted) (JA 210-216) and by the Petitioners (arguing both the ineffectiveness of the 1989 amendment to the Sales Tax law and the refusal of the Arkansas Supreme Court to treat cable television services and the businesses engaged in the print segment of the mass communications media as being similarly situated taxpayers for purposes of applying this Court's First Amendment devised constitutional test, which test had then been applied by the highest appellate court of at least one other state). (JA 216-225) Both of these Petitions for Rehearing were denied by the Arkansas Supreme Court's Order of April 2, 1989. (App. A, p. 1a, Pet. for Cert. Dkt. No. 90-38)

Petitions for Certiorari. Both the Arkansas Revenue Commissioner and the representative Petitioners of the certified class of Arkansas taxpayers and cable television operators filed separate Petitions for Certiorari with this Court on July 2, 1990, and both petitions were granted and these causes were consolidated for purposes of briefing and argument by this Court's Order of October 1, 1990. (JA 226)

SUMMARY OF THE ARGUMENT

Initially, it is important to note what the questions presented in this case are and what they are not. The questions presented here are ones of state taxation, and the application of First Amendment principles is solely for the purpose of determining whether the providers of cable television services are treated differently (for Sales Tax purposes) that Arkansas treats similarly situated businesses that are communicators and speakers in both the electronic and print segments of this mass communications media. This is *not* a case that presents questions or disputes over prior restraint on speech, access to cable facilities, franchising of cable systems, or regulation of the content or nature of the programming utilized in this cable television segment of the mass communications media.

This case simply presents the vehicle for this Court to answer the question it reserved in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421, 107 S.Ct. 1722 (1987), at 1729, to wit:

> [W]e need not decide whether a distinction between different types of periodicals [media] presents an *additional basis for invalidating the Sales Tax, as applied to the press.* (Emphasis Added)

The majority of the lower federal appellate courts and the highest appellate courts of the States of Oklahoma and New York have, in implementing the rationale of this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983), answered that question in the affirmative. These courts have held that, unless there is some logical reason for distinguishing beween the different segments of the mass communications media, cable television services should enjoy the same broad First Amendment rights traditionally afforded those businesses involved in the print segment of this mass communications media.

The Arkansas Supreme Court, in its decision in this case, erroneously declined to broadly apply this First Amendment test to determine if the challenged Sales Taxes are applied discriminatorily upon the sales of cable services. The Arkansas court based its decision upon its statement that no decision of this Court has been rendered that requires businesses in the print and electronic segments of the mass communications media to be treated and taxed the same. (785 S.W.2d, at 204)

The Petitioners submit that the proper application of this Court's "balancing of interest" test (where a state tax is imposed discriminatorily upon businesses involved in the electronic and print segments of the mass communications media, thus causing an incidental infringement upon the taxpayers' First Amendment rights) was stated by the Oklahoma Supreme Court in its decision in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 1312 (Ok., 1990) and the New York Court of Appeals in its adoption of that state's intermediate appellate court's decision in the case of *McGraw-Hill, Inc. v. State Tax Commission*, 252 N.E.2d 163 (N.Y., 1990), *adopting* 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989).

The Petitioners submit that this Court should reverse the portion of the Arkansas Supreme Court's opinion below that found the 1989 amendment to Arkansas Sales Tax statutes had cured the constitutional infirmity that had previously been found by that court to exist in Arkansas' statutory scheme of Sales Taxes. This Court should mandate that this broader test for measuring discrimination among businesses engaged in the mass communications media must be applied in determining whether businesses involved in both the electronic and print segments of the mass communications media are similarly situated and are similarly taxed.

Therefore, the Petitioners submit that this Court should use the evidentiary record established in this case to affirmatively answer the question the Court reserved in the

Arkansas Writer's Project case and find that, for periods after the 1989 amendment to the Arkansas Sales Tax law, the constitutionally prohibited discrimination in Arkansas' taxation of the sales of cable services has continued.

ARGUMENT

CABLE TELEVISION SERVICE PROVIDERS SHOULD BE DETERMINED TO HAVE THE SAME FIRST AMENDMENT PROTECTED RIGHTS OF FREE SPEECH AND FREE PRESS AS DO BUSINESSES INVOLVED IN THE SALE OF GOODS AND SERVICES IN THE PRINT SEGMENT OF THE MASS COMMUNICATIONS MEDIA FOR PURPOSES OF DETERMINING WHETHER A STATE TAX IS BEING DISCRIMINATORILY IMPOSED UPON SALES OF GOODS OR SERVICES BY ONE ENTITY AND NOT THE OTHER.

The Arkansas Supreme Court properly found that Arkansas' statutory scheme for imposing Sales Taxes unconstitutionally discriminated against the sale of cable television services during the period from July 1, 1987, through June 30, 1989. In rendering this decision, the Arkansas court applied the First Amendment based test announced in this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983), which test was further implemented by the Court's decisions in the cases of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).[5]

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[5]The Petitioners submit that the Arkansas Supreme Court's application of this Court's First Amendment based test to the undisputed facts established by the evidentiary record in this case was too narrow and restrictive in light of the purpose for this test, i.e. to protect similarly situated speakers from government action. In *Texas Monthly* this Court struck down a statutory scheme for imposing Texas' Sales Taxes that allowed only one (1) exemption, i.e. for religious publications. In implementing this Court's test in a magazine publisher's First Amendment based challenge to Oklahoma's Sales Tax scheme, the Oklahoma Supreme Court rejected the Oklahoma Tax Commission's plea for the adoption of a "restrictive" or "narrow" application of this First Amendment test (as was adopted by the Arkansas Supreme Court in this case) by stating:

> [W]e find that the Court announced constitutional standards are meant for broad and general application to the press.

Dow Jones & Co. v. Oklahoma Tax Commission, 787 P.2d 843, at 846 (Ok., 1990)

However, for periods after July 1, 1989,[6] the Arkansas court refused to broadly apply the rationale of this First Amendment based test, to even compare cable services to the services and goods sold by businesses engaged in the print segment of the mass communications media. Therefore, under this restrictive application of the *Minneapolis Star* test, the Arkansas Court specifically refused to find that cable television operators were similarly situated to other businesses involved in the sale of goods or services in the electronic and print segments of the mass communications media in Arkansas for purposes of determining whether or not Arkansas' Sales Taxes continued to be discriminatorily imposed, after the 1989 amendment to the Sales Tax law. It is this "narrow" application of the *Minneapolis Star* test by the Arkansas Supreme Court that has been questioned by the Petitioners in Docket No. 90-38.

a. *Purpose for the Minnespolis Star Test*

This Court specifically announced in both its *Minneapolis Star* and *Arkansas Writer's* decisions that the reason for the adoption of this First Amendment based test was to determine whether similarly situated First Amendment protected speakers were being taxed differently, so as to question even the threat of a censorial action by the government on their rights of free speech and free press. If this situation was found to exist, then the Court presumed that the reason for the differential tax treatment was "not unrelated to the suppression of expression." *Minneapolis Star, supra*, 460 U.S. at 585.

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[6]The effective date upon which Act 769 of 1989 attempted to extend Arkansas' state and local Sales Taxes to charges made not only for cable television service, but also charges made for "scrambled" satellite television broadcast services. As explained, *infra*, ftnt. 17, the Petitioners believe this attempt to impose Arkansas' Sales Tax on charges for these "scrambled" satellite broadcast television services was ineffective and illusory.

Therefore, once the challenging taxpayer has evidentiarily established the existence of this differential taxation among or between members of the press (*Arkansas Writer's*, 107 S.Ct. at 1729),[7] then the burden of proof shifts from the taxpayer to the taxing authority to establish a "compelling" governmental interest that is being served by this differential taxation.[8] This is a heavy burden placed upon the taxing authority,[9] and the mere raising of general revenues has consistently been held *not* to be an adequate "compelling" governmental interest that will overcome this incidental infringement upon the mass communicators' First Amendment protected rights of free speech and free press.[10]

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[7]Though this Court held in *Minneapolis Star* that the challenging taxpayer did not have to show a "censorial" intent on the part of the General Assembly in passing the challenged Sales Tax, the Petitioners must note that, in the nearly four years since the *Arkansas Writer's Project* decision was rendered, the Arkansas General Assembly has, on two occasions, taken a positive vote *not* to repeal the exemption that was questioned in the *Arkansas Writer's Project* case, see footnote 4, *supra*. Indeed, the tax administrators in Arkansas have themselves broadened the discrimination against cable television by issuing Revenue Policy Statements 1988-1 and 1988-3 (PX 12 and PX 13, JA 200-202) that have removed Arkansas' Compensating (Use) Tax from subscription fee for magazines printed by out-of-state publishers and sold in Arkansas. Thus, in Arkansas, the admonitions of this Court's teachings in *Minneapolis Star* and *Arkansas Writer's Project* have generally been ignored by the Arkansas General Assembly.

[8]This "balancing of interests" test for First Amendment purposes was adopted by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968) and made applicable to this question of state taxation by its adoption in *Minneapolis Star*, 460 U.S. at 585.

[9]See, *Minneapolis Star*, *supra*, 460 U.S. at 592-593; *Arkansas Writer's Project*, 107 S.Ct. at 1730.

The Petitioners submit that the Arkansas Supreme Court failed to even begin to apply the proper *Minneapolis Star* analysis in this case, because it refused to even compare cable services with the goods and services furnished by the print media. The only reason given by the Arkansas court for failing to apply this *Minneapolis Star* test to Arkansas' Sales Tax scheme (as amended in 1989) was because that court found no decision of this Court that had made a comparison of businesses involved in the electronic segment of the mass communications media, with businesses involved in the print segment of the media. (785 S.W.2d at 204)

The evidentiary record in this case clearly establishes that cable operators disseminate to their subscribers the same type of communications or messages as do the publishers of newspapers and magazines, as well as do the operators of wireless broadcast television and radio and "scrambled" satellite broadcast television services. In the last 20 years cable television has experienced explosive growth and is now the normal or major source for news, information and entertainment in more than 50% of all of the homes in the United States. With the dramatic drop in newspaper readership among citizens under 35 years of age, this cable medium of communication may well become even more the accepted source for news, information and entertainment in the next 20 years. Therefore, it seems illogical for any court to allow this segment of the mass communications media to be threatened by differential taxation by the states, just when it

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[10]The Petitioners acknowledge that, as First Amendment protected speakers, cable television operators (like their brethren who are engaged in businesses in the other electronic and print segments of the mass communications media) are not exempted from paying taxes of general application, *Minneapolis Star* 460 U.S. at 581-582. In fact, the record reflects that cable operators in Arkansas pay generally applicable state income taxes, property taxes, and sales and use taxes imposed upon their taxable purchase. (JA 91-92) The sale of cable services have been singled out by Arkansas to be subjected to the state's Sales Taxes, from among the sales of goods or services by similarly situated First Amendment protected communicators in the mass communications media, it is this action that the Petitioners complain about in this appeal.

appears that cable television is to be on the threshold of becoming one of the pervasive mediums for public communication in this country.[11]

b. *First Amendment Comparison and Analysis*

This Court has already determined that the activities engaged in by cable television service providers in communicating news, informtion and entertainment to cable subscriber-customers are activities that are entitled to claim, and be protected by, the First Amendment's guarantee of free speech and free press. In the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), at 494, Chief Justice Rehnquist stated:

> We do think that the activities in which Respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of that available space to reprint (or retransmit) the communications of others, while at the same time providing some original content." App. 3a
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to

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[11]The Petitioners submit that not only is the context of cable television's communications similar to that of magazine and newspaper publishers, they also point out that the form of the sale of their service is similar to that of the print media. Both of the separate segments of the mass communications media sell their products in return for a periodic subscription fee and both are partially supported by the sale of advertising. In fact, the Petitioners maintain that cable television service is really more analogous to the products sold by the print segment of the mass communications media, than it is to the business engaged in by wireless broadcast television. See, *Quincy Cable TV, Inc. v. FCC*, 769 F.2d 1434, at 1450 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986).

> include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their program will include." . . . Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphleteers. (Citations Omitted)

The Petitioners have attempted to take these statements of principle as a guide for their pleadings (Second Amended Complaint, ¶ ¶ 17-19, JA 12) and their proof in this case. They believe that the evidence that they have introduced into the record in this case overwhelmingly establishes that cable television services in Arkansas partake of enough of the aspects or characteristics of speech and communication traditionally associated with the publication of newspapers and magazines to cause cable television to be considered as being similarly situated to these businesses engaged in the print media (for purposes of applying the *Minneapolis Star* test). Accordingly, the Petitioners submit that cable television services should be equated and compared to these more traditional mass communicators in the print segment of the mass communications media for purposes of measuring whether Arkansas' statutory scheme for imposing its Sales Taxes meets First Amendment constitutional muster.

Both before and after this Court recognized that cable television could claim the First Amendment rights of free speech and free press, the majority of the federal district and appellate courts that have examined the extent of cable's First Amendment rights have generally held that (unless there is some logical reason to impose a restriction upon these rights of free speech and free press), these First Amendment protected rights would be as broadly construed for cable operators, as

they had previously been construed for the more traditional print segment of the mass communications media.[12]

In its opinion below, the Arkansas Supreme Court referenced the opinion by the District of Columbia Court of Appeals in the *Quincy Cable TV, Inc., supra*, as a decision that set forth a good discussion of the history of the development of cable television.[13] After a thorough and detailed analysis of the First Amendment rights accorded to various segments of the mass communications media, the appellate court in *Quincy Cable TV* held (758 F.2d at 1450):

> While *Miami Herald* involved the conventional press, as this Court has had prior occasion to observe, there is no meaningful distinction between cable television and the newspapers on this point. *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 46.
>
> Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic entity for purposes of the First Amendment, the analogy to more traditional media is compelling . . . .

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[12]See, *HBO v. FCC*, 567 F.2d 29 (C.A.D.C., 1977), *cert. denied*, 434 U.S. 839 (1977); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (C.A.D.C., 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (C.A.6, 1985), *affirmed and remanded*, 476 U.S. 488 (1986); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal., 1968); and *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954 (N.D. Cal., 1987).

[13]See also, Parsons, *Cable Television and the First Amendment*, Chapter 2, Lexington Books (1987); Shapiro, Kurland & Mercurio, *Cablespeech: The Case for First Amendment Protection*, Law & Business, Inc. (1983); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L.Rev. 133 (1976) and Note, *Cable Television: A New Challenge for the "Old" First Amendment*, 60 St. John's L. Rev. 114 (1985). This last Note contains an extremely comprehensive and thoughtful analysis of the underlying issue presented here regarding the comparison of cable television to other members of the mass communications media for First Amendment purposes.

Since there is no electro-magnet spectrum limitation upon cable television's ability to deliver news, information and entertainment, as there is with the delivery of these communications by wireless broadcast television and radio services. Thus, the "compelling" interest that this Court found was served (in regulating the First Amendment rights of wireless broadcast radio and television to be somewhat less than those traditionally accorded the print media) is simply not present in this case.[14]

c. *Proper application of the Minneapolis Star test.*

As noted above, the Petitioners submit that the Arkansas Supreme Court, below, erroneously and too restrictively, applied this Court's First Amendment based test it mandated in *Minneapolis Star* for purposes of comparing the tax treatment given to similarly situated members of the press. That court refused to compare the electronic and print segments of the mass communications media for purposes of testing the discriminatory aspects of Arkansas' statutory scheme for imposing its Sales Taxes. The Petitioners submit that the broader application of this Court's rationale, as adopted by the Oklahoma Supreme Court in *Oklahoma Broadcasters Association, Inc. v. Oklahoma Tax Commission*, 789 P.2d 312 (Ok., 1990) and the New York Court of Appeals in *McGraw-Hill, Inc. v. State Tax Commission*, 341 N.Y.S.2d 252 (App. Div. 3 Dept., 1989) *affirmed and adopted*, 252 N.E.2d 163 (N.Y. 1990), should have been utilized by the Arkansas Supreme

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[14]See, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Cable television's technological ability to deliver more messages and communications has increased from 10 or 12 channels in the 1950's, to where the standard cable systems in Arkansas now have some 36 or more channels. In the next 10 years, both cable television and direct broadcast satellite (DBS) services will be able to provide 100 or more channels per receiver. Therefore, the Petitioners submit that there is no reason for this Court to approve the Arkansas Supreme Court's failure to recognize this technological revolution in our method of mass communications by refusing to even compare cable television to businesses engaged in the more traditional print segment of the mass communications media.

Court, to measure the discrimination that might exist in Arkansas' statutory scheme for imposing its Sales Taxes.

In *Oklahoma Broadcasters Association*, in analyzing the question of the differences that might rise between the First Amendment rights of those businesses involved in the electronic segment of the mass communications media, as opposed to those businesses involved in the print segment of the mass communications media (for purposes of the state's statutory Sales Tax scheme), the Oklahoma Supreme Court held (in discussing this Court's *Minneapolis Star* and *Arkansas Writer's Project* cases (789 P.2d at 1316):

> Though both *cases* admittedly deal with differential treatment among members of the *print media*, there is nothing to suggest that this Court should, without sufficient justification, accrue preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press.
>
> These exemptions have resulted in differential treatment that are, therefore, subject to constitutional review. *The test is whether the state can justify such differential treatment with a "counter" balancing interest of compelling importance that it cannot achieve without differential taxation.* (Emphasis Added)

Likewise, in the differential treatment of advertising income for purposes of computing New York state's corporate franchise taxes, the intermediate New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was differential treatment between the print media and the broadcast media in this case, it is incumbent upon Respondent to show 20 N.Y.S.C.R.R. 4-4.3(f)(2) was necessary to serve a compelling State interest. This in our view it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to

> governmental regulation and that there are many differences between the print and visual media. *While this may be true, such an argument fails to show any compelling state interest in taxing the two types of media differently.* Thus, the regulation must fall . . . . To conclude, we find, the regulation at issue is unconstitutional under the 1st Amendment and grant the petition. (Emphasis Added)

Therefore, among the state appellate courts that have considered the application of the *Minneapolis Star* rationale in instances involving a discriminatory scheme of taxation between businesses involved in the electronic segment and businesses involved in the print segment of the mass communications media, the Arkansas Supreme Court's decision in this case is the *only* one that has narrowly limited the scope of the First Amendment protection afforded similarly situated mass communicators by refusing to find that the electronic speaker is similarly situated to the print speaker.[15] Thus, the Arkansas Supreme Court never even put the state to its burden of proof under the "balancing of interests" test in this case. This action was clearly erroneous and should be reversed by this Court's decision in this case.

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[15]The highest or intermediate appellate courts of a number of other states have more broadly applied the First Amendment based standards set down by this Court's *Minneapolis Star* and *Arkansas Writer's Project* cases. Some of these decisions have declared that gross receipts based taxes imposed upon magazines, but not newspapers, to be unconstitutional. See, *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1st Div., 1987); *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tn. 1990), *cert. pending*, Docket No. 90-273; *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tn. 1990), *cert. pending*, Docket No. 90-273; *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843 (Ok., 1990); *Hearst Corporation v. Dept. of Revenue*, 779 S.W.2d 557 (Mo., 1989); *Dept. of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla., 1990); Cf. *Hearst Corp. v. Iowa Dept. of Revenue and Finance*, ____ N.W.2d ____, 1990 WL 135941 (Ia., Sept. 19, 1990). Also, in the comparison of similarly situated businesses within the electronic segment of the mass communications media, the courts have consistently held for the taxpayer where the gross receipts based taxes were discriminatorily imposed against the First Amendment protected speaker-taxpayers. See, *City of Alameda v. Premier Communication Network, Inc.*, 202 Cal. Rept. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984), and *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).

d. *The facts in this case establish that cable television services are similarly situated to goods or services provided by other businesses involved in the electronic and print segments of the mass communications media.*

As noted above, this Court held in the *Preferred Communications* case (460 U.S. at 494) that "cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers . . . ." The evidentiary record established by the Petitioners in this case (as discussed more fully above in the Statement of the Case) clearly proves that cable television operators in Arkansas are providing the same type of news, information and entertainment to their subscribers (over a coaxial cable), as are the operators of wireless broadcast radio and television businesses, "scrambled" satellite subscription services, and, more importantly, the publishers of newspapers and magazines. This is why the trial court Chancellor noted that the Petitioners' witnesses had referred to cable television programming as an "electronic magazine."

In fact, the Petitioners submit that the Arkansas taxing authorities have not even raised any question but that the content of the news, information and entertainment being conveyed by Arkansas cablecasters is the same type of communication that is being conveyed by publishers engaged in the print segment of the mass communications media. Instead, the *only* premises for the state's defense in this case have been that cable television makes greater use of the public right-of-ways and that the Arkansas General Assembly allegedly lacked knowledge of the existence of "scrambled" broadcast television services when it adopted Act 188 of 1987. The state has alleged that cable's greater use of the public right-of-ways caused cable to be more susceptible to regulation than other businesses involved in the print segment of the mass communications media and therefore absolved the Arkansas General Assembly from establishing a nondiscriminatory Sales Tax scheme for imposing these state and local Sales Taxes upon the proceeds received from the sale of cable television services.

The Petitioners submit that the Arkansas Supreme Court correctly rejected the Revenue Division's argument, based upon the greater use of the public right-of-ways, by finding that the cable companies paid a franchise fee for the "rental" of the public right-of-ways and, in any event, that the use of these public right-of-ways by the cable operators had nothing to do with the comparison of cable services and those of other mass communicators for purposes of imposing Arkansas' Sales Taxes.

The state's argument that the Arkansas General Assembly had no knowledge of the existence of "scrambled" satellite broadcast television subscription services is without merit, because it has no factual or legal basis in the record in this case. The Petitioners' *original* Complaint (filed in late May of 1987) raised the issue of the discrimination that existed between the taxing of cable services and "scrambled" satellite television services and the Arkansas General Assembly met at least four (4) times thereafter in special session (before Act 769 of 1989 was adopted) and this issue was never broached by the Arkansas Legislature.[16]

The trial court's analysis of cable television's First Amendment rights, as compared to those of other businesses engaged in electronic and print segments of the mass communications media in Arkansas, was much more detailed than that of the Arkansas Supreme Court. The evidentiary record established in this case supports the Chancellor's findings that there is a very close relationship between the content of cable television's programming and the communications made to subscribers by the publishers of magazines and newspapers to their subscribers. There is cross or common ownership of cable and print speakers and there are instances in which these owners jointly market the services of both their print and cable businesses. That is why these electronic and print media businesses were said to have a "symbiotic" relationship.

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[16]See the Appellants' Response to the Appellees' Petition for Rehearing filed with the Arkansas Supreme Court below.

Though there may be differences between the First Amendment rights of cable television communicators and print communicators for purposes of regulation, access or delivery of services, etc., there is absolutely no logical reason to differentiate between these two segments of the mass communications media for purposes of imposing state and local Sales Taxes. Thus, as this Court noted in *Arkansas Writer's Project* (107 S.Ct. 1728), "a tax that differentiates between members of the press" [media] cannot be justified because it is needed to raise general revenue.

This raising of general revenues is the only reason given in this record by the Arkansas tax administrators for imposing these state and local Sales Taxes upon the Petitioners' cable television services. This particular justification has consistently been rejected by this Court as not being a sufficiently "compelling" governmental interest to justify the discriminatory imposition of an otherwise general Sales Tax among similarly situated members of the mass communications media. *Arkansas Writer's Project*, 107 S.Ct., at 1728-30. Accordingly, the Petitioners submit that the State of Arkansas has "defaulted" on its obligation to establish, under the *O'Brien* "balancing of interests" test, a "compelling" governmental interest that is still being served by the continued (post Act 769 of 1989) discriminatory imposition of Arkansas' Sales Taxes upon charges made for cable television subscription services.

Even after the Arkansas General Assembly's amendment of Ark. Code Ann. § 26-52-301(3)(D) by Act 769 of 1989 (effective July 1, 1989), Arkansas' statutory scheme for imposing its state and local Sales Taxes still does not impose these excise taxes upon the gross proceeds received from (1) the sales of newspapers; (2) the sales of magazines by subscription; (3) the sale of advertising to support broadcast radio and television services; (4) the sale of advertising in newspapers and on billboards; and (5) the sale of 80% or more of the "scrambled"

satellite television broadcast services sold by subscription in Arkansas.[17]

Therefore, the Petitioners submit that this Court should take this opportunity to affirmatively answer the question it reserved in its *Arkansas Writer's Project* case,[18] regarding whether the differential taxation of different types or mediums of expression in the mass communications media presents an additional basis for invalidating the Sales Taxes imposed upon the press, by reversing the Arkansas Supreme Court's decision in this case (for periods after July 1, 1989). It is clear that Arkansas still discriminatorily imposes its state and local Sales Taxes upon the cable television segment of the press, but not upon most all other similarly situated businesses involved in the electronic or print segments of the press [mass communications media] operating in Arkansas.

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[17]Based upon the "advisory" nature of the Arkansas Supreme Court's prospective approval of the amendment to the Arkansas Sales Tax law by Act 769 of 1989, without the challenging taxpayers being allowed to attack such amendment to the Sales Tax law so as to try and evidentiarily show that the discriminatory imposition of the Sales Taxes has continued (see the Appendices I, II and III of the Appellants' Petitions for Rehearing filed in the Arkansas Supreme Court), then, even if this Court should somehow find that the narrow application of this Court's First Amendment standards applied by the court below was the correct one, the decision of the Arkansas Supreme Court should nonetheless be modified, with regard to its approval of the 1989 amendment to the Sales Tax law. This Court should allow these challenging taxpayers and cable operators to be able to evidentiarily attack such amended statute, on remand, in this case, or in a separate action, without there being a claim of collateral estoppel on the part of the State of Arkansas. This situation now exists because of the "advisory" opinion rendered by the Arkansas Supreme Court that constitutionally approved this 1989 amendment without their being an evidentiary record upon which such decision could be based.

[18]107 S.Ct. at 1729.

CONCLUSION

For the numerous reasons set forth above, the representatives of this class of taxpayers and cable operators respectfully submit that this Court (1) should render a decision overturning the part of the Arkansas Supreme Court's decision that narrowly applied the First Amendment test announced by this Court in its *Minneapolis Star* decision, and (2) should declare that Arkansas' statutory scheme for imposing the challenged Sales Taxes (even after the statute's 1989 amendment) is still unconstitutional because it imposes these state and local Sales Taxes upon the sale of cable television services and not upon the sales by other similarly situated businesses engaged in both the electronic and print segments of the mass communications media in Arkansas.

Respectfully submitted,

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